Docket No.: 63190-US-PCT
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Felipe Martinez

Application No.: 10/560,732 Confirmation No.: 3731

Filed: December 15, 2005 Art Unit: 1782

For: THIN FOAMED POLYETHYLENE SHEETS Examiner: James C. Yager

REPLY BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

As required under § 41.41, this Reply brief is filed within two months of the June 14th, 2011 filing of the Examiner's Answer. A Request for Oral Hearing accompanies this Reply Brief.

This brief contains items under the following headings as required by 37 C.F.R. § 41.37(c) and M.P.E.P. § 1208:

(I) Identification page setting forth the appellant's name(s), the application number, the filing date of the application, the title of the invention, the name of the examiner, the art unit of the examiner and the title of the paper (i.e., Reply Brief);

(II) Status of claims page(s);

(III) Grounds of rejection to be reviewed on appeal page(s); and

(IV) Argument page(s).

II. STATUS OF CLAIMS

A. Total Number of Claims in Application

There are twenty-three (23) claims in the application, seventeen (17) of which are still pending.

B. Current Status of Claims

1. Claims canceled: 7, 10, 19
2. Claims withdrawn from consideration but not canceled: 15, 16, 23
3. Claims pending: 1-6, 8, 9, 11-14, 17, 18 and 20-22
4. Claims allowed: none
5. Claims rejected: 1-6, 8, 9, 11-14, 17, 18 and 20-22

C. Claims on Appeal

The claims on appeal are claims 1-6, 8, 9, 11-14, 17, 18 and 20-22.

III. GROUNDS OF OBJECTION TO BE REVIEWED ON APPEAL

1. Whether claims 1-6, 8, 9, 11-14, 17, 18 and 20-22 are obvious over US 6,114,025 to DeVaudreuil et al. in view of US 4,360,556 to Heider.

2. Whether claims 12 and 21 are obvious over US 6,114,025 to DeVaudreuil et al. in view of US 4,360,556 to Heider, in further view of US 3,963,403 to Hughes et al.

IV. ARGUMENTS RESPONSIVE TO THE EXAMINER'S ANSWER

Appellant has read the Examiner's Answer and wishes to respond to a few points.

In general, the Examiner has selectively chosen passages from the various references, ignoring what the teachings as a whole would mean to the person of ordinary skill in the art. For Example, the Examiner has stated that "Contrary to applicant's assertion, the film of DeVaudreuil is not limited to protective packaging for furniture, this is merely disclosed as a potential use of the film" (Page 9, lines 1-2 of Examiner's Answer). Appellants are in full agreement that other uses would be "covered" by the claims of DeVaudreuil as the claims are silent as to the intended use, but stringently contest the implication that a person of ordinary skill in the art would know to apply the teachings of DeVaudreuil to other applications. Protective packaging for heavy delicate items such as furniture is not merely listed as one of many potential uses – it is the ***only*** use specifically mentioned. The Examiner is combining the teachings of a resilient foam heralded for use in protecting delicate items with a reference which touts a six pack carrier having reduced weight. A person of ordinary skill in the art would understand that packaging applications in which the purpose of the bubbles is to impart resiliency, have little in common with six pack rings in which the purpose of the bubbles is to reduce the weight of the film. These applications and the desired characteristics of the respective films which would make them successful are clearly dissimilar. Aside from the common sense understanding of the differences in these films, it is again pointed out that despite Heider having been published some16 years before DeVaudreuil et al. filed their application, the later inventors did not make the combination themselves. Given the advantages of lower cost and less environmental footprint, if it were obvious to down-gauge the films of DeVaudreuil, they would have done so themselves.

Similarly, the Examiner clings to the passage at Col 7, lines 4-8 of DeVaudreuil which states that the films should be "less than 13 mm" as support that a person of ordinary skill in the art would understand this to mean that the films of DeVaudreuil could be 3 to 8 mils (approximately 0.25 to 0.20 mm). Again, there is a difference between whether a film of 3 to 8 mil thickness would fall within the scope of a claim which recited "less than 13 mm" vs. whether a person of ordinary skill in the art would find it obvious from the teachings of DeVaudreuil to make a film of such thickness. This is especially true given DeVaudreuil's statement at column 7, lines 5-8, that films having thicker cross-sections than 13mm are contemplated, without a corresponding statement that films having thinner cross-sections (than the preferred limit of 0.5 mm) were also contemplated.

The Examiner has also stated at page 11, line 6-7 that "Applicant's assertion that DeVaudreuil recites that its LLDPE component has a melt index of from 0.5 to 1.5 g/10min is clearly erroneous given that DeVaudreuil actually recites an MI of less than about 10 dg/min." A close reading of the paragraph beginning at line 3 of column 4, however, does not support the Examiner's statement that the Applicant is "clearly erroneous". In actuality, DeVaudreuil states both that the LLDPE has an MI from 0.5 to 1.5 (line 4) and that the linear low density ethylene has an MI less than 10 (line 11). Given that the recitation of "0.5 to 1.5" is stated first, is more specific, and corresponds more closely to the preferred ranges (0.6 to 1.0 see col. 4, line 16-17), it is respectfully submitted that a person of ordinary skill in the art would probably consider that to be the correct range and not the passage cited by the Examiner. At any rate, it cannot be fairly said that DeVaudreuil unambiguously teaches using LLDPE having a melt index greater than 1.5. This also means that the Examiner's arguments that **modified** DeVaudreuil must inherently have the MD tear strength fail, as the Examiner cannot prove that the materials used to make the films are in fact the same.

The Examiner also misses the point of Applicant's argument against the Examiner's assertion than getting to a film size of 3 to 8 mils is a matter of routine experimentation. If the films of DeVaudreuil were simply reduced to 3 to 8 mils, Applicant would agree that this would not be inventive, as in general, there is always the desire to down-gauge the thickness of films ***provided that*** the properties of the film are maintained. The point, however, is that other aspects of the film have to be changed in order to achieve an ***acceptable*** film of that thickness. In the present case, if the films of DeVaudreuil were simply down-gauged without also reducing the size and amount of foam bubbles (represented in the claim as reduced amount of density reduction) and without choosing a resin with a higher melt index to allow the bubbles to disperse more uniformly, then the film would not be able to be made in the blown film process and even if it could be done, would not produce a film having the MD tear strength recited in the claims. Again, down-gauging is widely known to be desirable, so that if it truly were a matter of routine experimentation, DeVaudreuil would have done so themselves.

The Board is kindly directed to the main Appeal Brief for further arguments against the rejections put forth by the Examiner.

Dated: August 11, 2011

Respectfully submitted,
Electronic signature: /James T. Hoppe/
James T. Hoppe
Registration No.: 35,899
THE DOW CHEMICAL COMPANY
P.O. Box 1967
Midland, Michigan 48641-1967